



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: C&J Service
File: B-230579.3
Date: September 23, 1988

DIGEST

1. Since the Small Business Administration (SBA) determines whether a firm is small and disadvantaged for purposes of eligibility for Department of Defense small disadvantaged business (SDB) set-asides, the General Accounting Office will not consider a protest that a firm was not awarded a contract under an SDB set-aside where the SBA has found the firm ineligible.
2. Agency is not required to withhold award to second low bidder pending appeal of Small Business Administration determination that low bidder is not a small disadvantaged business (SDB), rendering firm ineligible for award under SDB set-aside.

DECISION

C&J Service protests the Department of the Army's award of a contract for housekeeping services at Fort Rucker, Alabama, to Teltara, Inc., under invitation for bids (IFB) No. DABT01-88-B-5001, a total small disadvantaged business (SDB) set-aside. C&J, the low bidder, contends that it improperly was determined not to qualify as an SDB, and denied the award on this basis.

We dismiss the protest.

A total SDB set-aside of the type at issue here is provided for in rules issued by the Department of Defense (DOD) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3973, and section 806 of Pub. L. No. 100-180, 101 Stat. 1126 (the DOD Authorization Act for Fiscal Years 1988 and 1989), which establishes for DOD a goal of 5 percent for contracting with certain minority businesses and institutions, including small business concerns owned and controlled by

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socially and economically disadvantaged individuals. See 53 Fed. Reg. 20626 (1988), adopting with modifications the interim rule at 53 Fed. Reg. 5114 (1988). See Arbor Landscaping, Inc., B-231515, June 13, 1988, 88-1 CPD ¶ 564.

Section 1207(a)(1) of Pub. L. No. 99-661 defines the firms to which the statute applies by reference to section 8(d) of the Small Business Act, 15 U.S.C. § 637(d) (1982), which in turn defines the term "small business concern owned and operated by socially and economically disadvantaged individuals," and to regulations issued under section 8(d). The Small Business Administration (SBA) has proposed regulations in this regard, which provide for SBA to determine SDB status. See 53 Fed. Reg. 21482 (1988). Further, DOD's implementing rules themselves prescribe that a protest of a bidder's eligibility for SDB status is for conclusive determination by the SBA. See Arbor Landscaping, B-231515, supra.

Here, the record shows that, based on information provided by C&J, the SBA considered C&J's status as a SDB and found that the firm did not qualify as one. Since section 1207 references SBA's regulatory role under section 8(d) of the Small Business Act, and since DOD's implementing rules for section 1207 clearly envision final and conclusive determinations by SBA of SDB status, we will not review SBA's determination that C&J does not satisfy the SDB criteria. Id.

C&J has filed an appeal of the SBA determination with the SBA itself, and argues that the agency was precluded from making an award to any other firm prior to a decision on that appeal.

As a general matter, a contracting agency is not required to withhold award during the pendency of an appeal before the SBA. See, e.g., Suddath Moving Systems, Inc., B-229992, Apr. 1, 1988, 88-1 CPD ¶ 332 (small business status protest). With respect to an appeal of a finding of ineligibility for SDB status, SBA's proposed regulations do not require agencies to withhold award pending an SDB appeal, and specifically provide that if an award is made while an appeal is pending, any subsequent reversal by the SBA of its finding of SDB ineligibility shall not affect that award; the successful appeal shall have only prospective effect with respect to future procurements. See proposed rule at 53 Fed. Reg. 21,482 (1988) (to be codified in 13 C.F.R. § 124.610(f)). Since there is no requirement

that an agency withhold award pending an appeal, C&J's complaint provides no basis for our objecting to the Army's actions.

The protest is dismissed.

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